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No. 84-236 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH ALBERICI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish that petitioner caused the mails to be used in furtherance of his arson and insurance fraud scheme.

2. Whether the mailing of a particular insurance claim form was done in furtherance of a scheme to defraud.

3. Whether petitioner was denied effective assistance of counsel at trial.

4. Whether an alleged error in the district court's instructions on the elements of mail fraud was harmless.

5. Whether petitioner was prejudiced by the prosecutor's alleged reference in summation to the guilty pleas of three government witnesses.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A25-A27) is reported at 735 F.2d 1351. The post-trial rulings of the district court (Pet. App. A2-A24) are also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A25-A27) was entered on May 15, 1984. A petition for rehearing was denied on June 14, 1984 (Pet. App. A28). The petition for a writ of certiorari was filed on August 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341. The district court subsequently determined

that one aspect of its instructions to the jury on the elements of mail fraud was erroneous and for that reason granted petitioner's motion for a new trial (Pet. App. A2-A20). Upon reconsideration, the district court reinstated the conviction on one mail fraud count (Count 5) on the ground that, as to that count, the erroneous jury instruction had been harmless beyond a reasonable doubt (Pet. App. A21-A24). Petitioner thereafter was sentenced to a 20-month term of imprisonment (Pet. App. A1). The court of appeals affirmed in a memorandum opinion (Pet. App. A25-A27).

The facts underlying petitioner's conviction may be summarized as follows. On May 9, 1977, petitioner entered into an agreement to purchase the Jerry Lewis Theatre building in Ashton, Pennsylvania. The purchase price was $210,000, and settlement was scheduled for August 6, 1977 (C.A. App. 367-370, 394, 431). The seller had no insurance on the theatre, and petitioner was advised to acquire $110,000 in insurance coverage prior to the settlement in order to protect his interest (*id.* at 432-434). On May 14, 1977 petitioner purchased $100,000 in fire insurance coverage from insurance agent Leonard Triggiani. The policy provided coverage for three months, until August 14, 1977 (*id.* at 535).

In mid-July 1977, petitioner approached Joseph Ditizio about setting fire to the theatre. Ditizio and petitioner drove to the theatre and, after inspection, Ditizio stated that the arson would cost between $20,000 and $25,000 (C.A. App. 600-602). Petitioner told Ditizio that he planned to blame the fire on the seller and collect the insurance. Petitioner gave Ditizio a key to the theatre and directed him to get back to him regarding the final price (*id.* at 602-606). Shortly after his meeting with petitioner, Ditizio contacted Charles Allen, an experienced arsonist. They visited the theatre and agreed on a minimum price of $20,000 for the arson job (*id.* at 610-611). Ditizio later negotiated a $25,000

price for the arson, and petitioner gave him $5,000 in advance for the purchase of the necessary materials (*id.* at 612-613).

On July 15, 1977 — approximately the date of petitioner's first approach to Ditizio regarding the arson — petitioner purchased another $100,000 fire insurance policy from Triggiani. The policy provided coverage for a period of one year, beginning July 15, 1977 (C.A. App. 536). On July 25, 1977 petitioner purchased another one-year fire insurance policy from Triggiani for $125,000 in coverage (*id.* at 537-538). On the next day, he purchased from a different insurance agent[1] two additional one-year policies totalling $150,000 in coverage (*id.* at 570-572). On August 2, 1977, petitioner purchased yet another fire insurance policy, in the amount of $25,000, from Triggiani (*id.* at 539-540). As a result of these transactions, for the period between August 2 and August 14, 1977, petitioner had $500,000 in fire insurance on a building that had been purchased for $210,000 and in which he had an insurable interest of $110,000.

On August 6, Ditizio and two accomplices carried out the arson by igniting a mixture of naptha and acid, which they had spread throughout the theatre. The resulting explosion and fire caused $214,440 in damage to the theatre (C.A. App. 616-622, 840-842, 978, 1040-1045). Shortly after the fire, Ditizio approached petitioner to obtain payment for the arson. Petitioner initially refused, but ultimately paid Ditizio $15,000 (*id.* at 625-627). Petitioner subsequently retained a public adjuster to collect on the loss. The adjuster, on petitioner's behalf, mailed a series of documents in

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[1]Petitioner did not tell either insurance agent that he was also purchasing fire insurance coverage from the other agent (*id.* at 541, 547).

order to obtain reimbursement under the policies (*id.* at 957-966).[2]

ARGUMENT

1. Petitioner first contends (Pet. 6-15) that the evidence was insufficient to support a finding that the mails had been used as part of the scheme to defraud. The courts below properly rejected this contention.

Petitioner stands convicted on one count of mail fraud based on a letter (GX 12) sent to the Curley Adjustment Company by Bertram Horowitz, the public insurance adjuster retained by petitioner after the arson. Petitioner argues that the evidence of Horowitz's regular office practice to mail such documents was insufficient to establish that the particular letter was sent through the United States mail. This contention is without merit.

Horowitz testified that the normal course of business of his company was to mail such documents. Pet. App. A30. Moreover, the letter was stamped "Received" by the Curley Adjustment Bureau, thereby making clear that its transmission to the addressee was completed.[3] Thus, unlike in the

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[2]Petitioner testified that he had had no part in the arson. According to petitioner, Ditizio's brother had set the fire as revenge for the loss of a job that he blamed on petitioner (C.A. App. 1353-1354, 1525). The government's rebuttal established that Ditizio's brother had never held the job in question (*id.* at 1419-1420, 1460-1462).

[3]Petitioner also contends (Pet. 6-7) that the evidence of use of the mails was insufficient because Horowitz testified that the office's normal practice in August 1977 was to mail such documents, while the particular letter at issue here was dated January 23, 1978. This fact-bound issue does not warrant review. In any event, there is no indication that the normal practice of Horowitz's office changed in the intervening five-month period, such that the normal course of business in January 1978 would have been to dispatch such routine correspondence by special messenger or some means other than by mail. Moreover, Horowitz testified that the particular letter of January 23, 1978 was the one which "sends" the claim to the representative of Curley Adjustment Company, thereby reinforcing the conclusion that the mails were used on that specific occasion.

two district court cases upon which petitioner principally relies (Pet. 8-10), this is not a case in which there was an absence of direct evidence that the document had ever been received and the prosecution sought to prove receipt by the intended addressee by establishing an office custom that the letter would have been mailed by the sender.[4]

Petitioner also contends (Pet. 7-8, 11-14), that there is a conflict in the circuits on the question whether an office custom of mailing documents such as was shown here is sufficient evidence to sustain a conviction for mail fraud under 18 U.S.C. 1341. There is no such circuit conflict. As petitioner concedes, the Fifth, Seventh, and Ninth Circuits

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[4]The first of two these cases did not even involve a mail fraud prosecution. See *United States ex rel. Helmecke* v. *Rice*, 281 F. 326 (S.D. Tex. 1922) (discussed at Pet. 8-10). In that case, the defendant was court martialed for desertion, and his defense was that he had never been notified of his induction. There was no direct evidence that the defendant had received such a notice; the only evidence of his receipt was the testimony of the Adjutant General that it was the custom of his office to mail such notices. The district court held that in order to establish actual notice, it was necessary to show either that the particular item had been mailed or an "invariable custom" of mailing. 281 F. at 331.

In *United States* v. *Wolfson*, 322 F. Supp. 798 (D. Del. 1971), aff'd, 454 F.2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972), (see Pet. 10, 12, 15), the mail fraud prosecution was based on receipt of a letter from the Postal Service. There was no direct evidence that the defendant received the letter, and the government sought to establish receipt by evidence of an office custom that the letter would have been mailed. The district court held that a standard of proof similar to that in *Rice* was required. 433 F. Supp. at 814.

In the third district court decision upon which petitioner relies (Pet. 10-11, 12-15), *United States* v. *Sinclair*, 433 F. Supp. 1180 (D. Del.), aff'd mem., 566 F.2d 1171 (3d Cir. 1977), the court found the evidence insufficient on Count II and sufficient on Count III. With regard to Count II, the opinion does not indicate that there was any evidence that the letter the defendant was charged with causing to be placed in the mail had been received. 433 F. Supp. at 1197. By contrast, with regard to Count III, there was persuasive evidence of receipt. *Id.* at 1197-1198.

all have held that use of the mails may be established by evidence of office custom. See Pet. 8, 12-14, citing *Stevens* v. *United States*, 306 F.2d 834, 835 (5th Cir. 1962); *United States* v. *Joyce*, 499 F.2d 9, 11 (7th Cir.), cert. denied, 419 U.S. 1031 (1974); and *United States* v. *Brackenridge*, 590 F.2d 810, 811 (9th Cir.), cert. denied, 440 U.S. 985 (1979). Indeed, these courts have adhered to that position in more recent decisions. *United States* v. *Goss*, 650 F.2d 1336, 1343 (5th Cir. 1981); *United States* v. *Ledesma*, 632 F.2d 670, 675 (7th Cir.), cert. denied, 449 U.S. 998 (1980); *United States* v. *Miller*, 676 F.2d 359, 362 (9th Cir. 1982). Petitioner contends (Pet. 8, 10-12), however, that the Third, Fourth, and Eighth Circuits have held that office custom is not sufficient to establish use of the mails. Petitioner is wrong. The Third Circuit of course held in this very case that Horowitz's testimony of a regular office practice of mailing such documents *was* sufficient evidence of use of the mails (see Pet. App. A26),[5] and the Fourth and Eighth Circuits have taken the same position. See *United States* v. *Scott*, 668 F.2d 384, 388 (8th Cir. 1981); *United States* v. *Scott*, 730 F.2d 143, 146-147 (4th Cir. 1984).[6] Accord, *United States* v. *Huber*, 603 F.2d 387, 399 (2d Cir. 1979), cert.

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[5]Petitioner's contention that the Third Circuit has taken a contrary view is based on the district court decisions in *Wolfson* and *Sinclair* discussed in note 4, *supra*. The Third Circuit's affirmances in those cases were of the defendant's convictions on counts that the district court did not set aside, and those affirmances therefore do not reflect approval of the district court's reasoning on other counts. Those decisions are in any event distinguishable, for the reasons explained in note 4, *supra*. Petitioner's reliance (Pet. 7) on *United States* v. *Hart*, 693 F.2d 286 (3d Cir. 1982), was properly rejected by the court of appeals (Pet. App. A26). In that case there was no evidence —direct or circumstantial — indicating that the document in question had been mailed. 693 F.2d at 288-289.

[6]Petitioner relies (Pet. 8, 11-12) on earlier decisions of the Fourth and Eighth Circuits. In *United States* v. *Ellicott*, 336 F.2d 868 (4th Cir. 1964), the panel majority held, over Judge Haynsworth's dissent, that

denied, 445 U.S. 927 (1980); *United States* v. *Roglieri*, 700 F.2d 883, 886 (2d Cir. 1983); *United States* v. *Gomez*, 636 F.2d 295, 297 (10th Cir. 1981). Review on this issue therefore is not warranted.[7]

2. Petitioner next contends (Pet. 15-20) that his trial counsel provided ineffective assistance in failing to investigate a possible defense and in rejecting the court's offer to give an accomplice instruction. There is no force to this contention.

After trial, the district court held an evidentiary hearing on petitioner's claims of ineffective assistance of counsel. The first of these complaints was that counsel failed to pursue the so-called "Lynch defense" — *i.e.*, petitioner's assertion that one Edward Lynch had a motive to harm petitioner and may have set the fire. It developed that defense counsel in fact had attempted to interview Lynch, but was unsuccessful. In addition, counsel had been informed by the prosecution that if an effort were made to interpose the Lynch defense, the government would present testimony from Ditizio and Allen that they had been hired

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the evidence of mailing was insufficient; but in that case, unlike here, there was direct evidence of *exceptions* to the regular office practice upon which the prosecution relied. See 336 F.2d at 870-871. In *United States* v. *Minkin*, 504 F.2d 350 (8th Cir. 1974), cert. denied, 420 U.S. 926 (1975), the court of appeals in fact affirmed the mail fraud conviction, relying in large part on evidence of the regular office practice. 504 F.2d at 352-353.

[7]Petitioner separately contends (Pet. 28-29) that the letter in question was not sufficiently related to the scheme to defraud to permit conviction under 18 U.S.C. 1341, as interpreted by this Court in *United States* v. *Maze*, 414 U.S. 395 (1974). This issue was not raised by petitioner in the court of appeals. It is, in any event, wholly without merit. Correspondence between insurance adjusters regarding the underlying fraudulent claim is beyond question integrally related to an insurance fraud. *United States* v. *Lebovitz*, 669 F.2d 894 (3d Cir.), cert. denied, 456 U.S. 929 (1982); *United States* v. *Moss*, 591 F.2d 428 (8th Cir. 1979).

by petitioner to assault Lynch (C.A. App. 1684, 1745-1746). Defense counsel also testified that he discussed the Lynch matter with petitioner, who agreed with counsel's decision to abandon the Lynch line of defense (C.A. App. 1700). Counsel's decision in these circumstances constitutes a classic example of a reasonable tactical choice that does not constitute ineffective assistance of counsel. *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 20-21; *United States* v. *Long*, 674 F.2d 848, 855 (11th Cir. 1982); *Hollenbeck* v. *Estelle*, 672 F.2d 451, 453-454 (5th Cir. 1982); *Long* v. *Brewer*, 667 F.2d 742, 744 (8th Cir. 1982).

Defense counsel's decision not to request an accomplice instruction likewise represents a studied tactical choice, not ineffective assistance of counsel. Counsel testified that, based on his experience in criminal cases, he had advised against requesting the accomplice instruction in this case because it could be a "double edged sword" that could "taint" petitioner by associating him with Ditizio, Allen, and Fardella (C.A. App. 1689, 1696, 1705-1706, 1712-1713). The district court expressly found on this basis that "there had been consideration given by counsel and the court to an accomplice charge" and that "defense counsel, having considered the matter at length among themselves, and in discussion with [petitioner] before points for charge were discussed with the court, had concluded that an accomplice charge was not in [petitioner's] interest and accordingly counsel decided against including such a charge" (Pet. App. A3; see C.A. App. 1689, 1706). Both courts below concluded that rejection of the accomplice instruction in these circumstances did not constitute ineffective assistance (Pet. App. A3-A5, A24, A27), and there is no reason for this Court to review their disposition of the matter.

This Court generally has left the determination of what constitutes ineffective assistance to the "good sense and discretion of the trial court[]." *McMann* v. *Richardson*, 397

U.S. 759, 771 (1970). Where, as here, counsel affirmatively requested the trial court not to give a particular instruction because it might not be in his client's interest and the trial court considered and acceded to that request, a reviewing court cannot lightly conclude that counsel's professional judgment so far departed from the acceptable level of competence as to constitute ineffective assistance of counsel. And in fact the court of appeals found that counsel's decision was a "permissible tactical choice" (Pet. App. A27). Moreover, petitioner has not established that there is any "reasonable probability" that the outcome of his trial would have been different if the instruction had been given. See *Strickland* v. *Washington*, slip op. 24. To the contrary, the district court made clear that it did not believe that the omission of the instruction satisfied the prejudice prong of the ineffective assistance of counsel test (Pet. App. A5).[8]

3. Petitioner argues (Pet. 20-25) that his conviction must be set aside because the jury instructions pertaining to the element of use of the mails impermissibly departed from the language used in the indictment. This claim is without merit.

Each of the six counts of the indictment charged petitioner, in pursuance of the arson and insurance fraud scheme, with "knowingly and wilfully caus[ing] to be delivered by mail" various documents relating to the insurance claims (C.A. App. 7-17). At trial the district court instructed the jury that it could convict if, among other elements of the offense, it found that petitioner "placed, or caused to be

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[8]Petitioner's additional claim of ineffectiveness based on a failure to interview witnesses (Pet. 19) was not presented to the court of appeals and therefore does not merit review by this Court. In any event, petitioner has not shown what would have been accomplished by those interviews or that there is a reasonable probability that the outcome of the trial would have been different if counsel had undertaken them.

placed in a post office or other authorized depository for mail a letter intended to be sent or delivered by the postal service" (Pet. Apap. A17).

After trial, the district court ruled that the instruction was erroneous because it permitted conviction on the basis of evidence that petitioner had caused a letter to be mailed without requiring the additional finding that petitioner had caused the letter to be delivered, as alleged in the indictment (Pet. App. A5-A19). The district court observed that its instructions would not have been erroneous if it also had instructed the jury that, based upon evidence of mailing, it could rely on a presumption that matter placed in the mail was thereafter delivered (Pet. App. A18). The district court subsequently reinstated the jury's verdict on Count 5 (Pet. App. A21-A24). The court explained that petitioner had not objected to the jury instruction and that it was in any event harmless (*id.* at A22-A23). The court found "abundant" evidence that the documents on which all of the counts were based had been placed in the mail (*id.* at A18; see also *id.* at A23); from this, the court reasoned that because the letter on which Count 5 was based had been stamped "Received" by the addressee Curley Adjustment Bureau, the jury "without question" would have found petitioner guilty beyond a reasonable doubt of causing the letter to be delivered by mail if it had been instructed to that effect (*id.* at A24).

Relying principally on this Court's decision in *Stirone* v. *United States*, 361 U.S. 212 (1960), petitioner argues (Pet. 20-25) that the district court's instruction constructively amended the indictment. This argument is wholly insubstantial. As an initial matter, although in *Stirone* the defendant objected to the jury instruction (361 U.S. at 214), petitioner made no such objection in this case. Moreover, the concern underlying the constructive amendment rule is that the petit jury might be permitted to convict on the basis

of charges that were never made by the grand jury. See, *e.g.*, *Stirone*, 361 U.S. at 217 (indictment charged exports were obstructed but instructions permitted conviction for obstructing imports of a different commodity); *United States* v. *Cusmano*, 659 F.2d 714, 719 (6th Cir. 1981) (indictment charged economic loss as extortionate threats but instructions permitted conviction for threats of physical violence); *United States* v. *Stewart Clinical Laboratory, Inc.*, 652 F.2d 804, 807 (9th Cir. 1981) (indictment charged illegal patient referral scheme but instruction permitted conviction for illegal referral of lab work). See also *Dunn* v. *United States*, 442 U.S. 100 (1979).

The distinction between the cases found to involve an impermissible constructive amendment of the indictment and this case is clear. In the cases just cited, this Court or the court of appeals perceived no necessary relationship between the two offenses — obstructing exports and obstructing imports; threats of economic loss and threats of physical violence; referral of patients and referral of lab work. But in this case, the deposit of the letter in the mail by Horowitz's company and its subsequent delivery to the Curley Adjustment Bureau were but the beginning and end of a single integrated transaction involving the use of the mails to transmit the letter.

For this reason, as the court of appeals observed, the grand jury could not have found that petitioner caused the letter to be delivered by mail without also believing that he caused it to be deposited in the mail (Pet. App. A26). Conversely, the petit jury could not have found that petitioner caused the letter to be placed in the mail without also believing that he had caused its resulting delivery. Compare *United States* v. *Lemire*, 720 F.2d 1327, 1340-1341, 1345-1346 (D.C. Cir. 1983), cert. denied, No. 83-1413 (June 4, 1984). Since there is as a practical matter no material difference between placing a letter in the mail and its delivery by

mail, there was no possibility that the petit jury convicted on the basis of an allegation never made by the grand jury. Compare, *Stirone* v. *United States*, 361 U.S. at 217-218; *United States* v. *Figueroa*, 666 F.2d 1375, 1379 n.2 (11th Cir. 1982). It is therefore not surprising that the attorney who represented petitioner at trial did not object to the instruction and the court and prosecution apparently did not perceive any defect in it when it was given.[9]

4. Finally, petitioner contends (Pet. 25-28) that the prosecutor's summation contained an unfair argument that petitioner should be convicted for the arson/insurance-fraud scheme because the three arsonists had already pleaded guilty prior to testifying at trial. This claim was properly rejected by the district court (Pet. App. A24) and the court of appeals (Pet. App. A27), and it does not warrant further review by this Court.

The three arsonists who had set the fire at the Jerry Lewis Theatre testified to their involvement in the arson and the fact that they each had entered a plea of guilty to arson or similar offenses. No objection was made to this testimony

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[9]Furthermore, the instructions taken as a whole in fact did not focus narrowly on whether petitioner caused the letter to be placed in the mail, in contradistinction to causing the delivery of the letter. Consistent with the circumstances of this case, the instructions on a number of occasions state more generally that petitioner was charged with "using" the mails or causing the mails to be "used" in connection with the arson and insurance fraud scheme. See C.A. App. 1547, 1551, 1556, 1557, 1558, 1561, 1562. Indeed, even the instruction to which petitioner objects stated that the government was required to prove that he caused the letter to be placed in a depository "to be sent or *delivered* by the postal service" (C.A. App. 1588 (emphasis added); see *id.* at 1560, 1568, 1595), and the court elsewhere stressed that the "means of delivery" must be the mails (*id.* at 1560). The court also stated that the jury would have the indictment with it during deliberations (C.A. App. 1548, 1559), and the indictment of course charged petitioner with causing the letter to be delivered. There accordingly is no reason to believe that the jury's attention was diverted from the delivery of the letter.

(Pet. App. A27). In the absence of aggravating circumstances, the failure sua sponte to give a cautionary instruction regarding evidence of a guilty plea does not require reversal. *United States* v. *Ojukwa*, 712 F.2d 1192, 1193 (7th Cir. 1983); *United States* v. *DeLucca*, 630 F.2d 294, 299 (5th Cir. 1980). Petitioner does not assert the presence of aggravating factors in this case, and, if anything, the circumstances actually mitigated any occasion for such an instruction. Petitioner and the three arsonists were not co-defendants and were not even charged with the same crime; and the arsonists could be judged guilty without necessarily finding that they had acted at petitioner's behest.

Petitioner now disavows any complaint regarding the admission of the guilty plea testimony (Pet. 26 n.3). Rather, he alleges misconduct in the prosecutor's use of that testimony in closing argument. The obvious flaw in his argument, however, is that the allegedly offensive passage (quoted at Pet. 25) contains no reference to the guilty pleas (C.A. App. 1534):

> *Mr Wehner (Prosecutor):* We brought before you the people that burned it down, and if you don't believe, based upon their testimony, based upon what Merrill told you, based upon the photographs, based upon the expert testimony that those three people burned down that theatre on August 6, 1977, then I invite you to acquit this defendant, because if they didn't burn it down, then there is no fraud.

As the district court observed when it overruled petitioner's objection, this passage merely stated that if the jury did not believe that there had been arson, it should not convict petitioner of mail fraud, because the prosecution had argued that the arson was the predicate for the fraud (*id.* at 1535). In any event, petitioner's fact-bound complaint of

prosecutorial misconduct does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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